



# EMPLOYMENT: EFFECT OF COVID 19 & MOVEMENT CONTROL ORDER

## INTRODUCTION

The Prime Minister of Malaysia has announced a Movement Control Order (“MCO”) from 18.03.2020 to 31.03.2020. Save for “essential services”, all public or private premises are ordered to close during the MCO period.

The MCO is necessary for the containment of the pandemic. At the same time, businesses also charter into choppy waters with reduced or no revenue during the MCO period.

Even before the MCO, businesses had suffered losses due to the effect of COVID 19 and when businesses suffer, employees will eventually be affected. Prime examples of this are the airlines and hospitality businesses, which were facing declining sales due to COVID 19, even before the MCO.

In these difficult times, the endeavor to keep the business as an ongoing concern needs to be balanced against the welfare of the employees. And in so doing, one may wish to consider the following:-

## EMPLOYER – EMPLOYEE RELATIONSHIP DURING THE MCO AND COVID-19 PANDEMIC

Due to the closure of businesses as a result of the MCO as well as the continuous outbreak of COVID-19, many industries are suffering steep decline in their businesses and are faced with financial difficulties in maintaining the overhead costs. Arising from this, many employers and employees have the following concerns:-

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### Payment of Wages during MCO, Quarantine Order and/or Home Surveillance

Unilateral imposition of wage deduction tantamount to a breach of the employment contract. In relation to this, the Ministry of Human Resources had in the Frequently Asked Questions (“**MHR FAQ**”) issued on 19.03.2020 stated that employers are required to pay full wages during the MCO from 18.03.2020 to 31.03.2020. The Ministry also clarified that the employers can require the employees to work from home during this period.

Further, the Department of Human Resources had on 07.02.2020 provided a Guideline on Handling Contagious Outbreak, including the Novel Corona Virus (“**MHR Guideline 07.02.2020**”), which advises the employers to pay full wages if their employees are given the Quarantine Order or Home Surveillance Order.

## Annual Leave / Unpaid Leave

The Ministry of Human Resources clarified in the MHR FAQ that the Employees cannot be compelled to utilize their annual leave or to take unpaid leave during the MCO as the MCO was made pursuant to the Prevention and Control of Infectious Diseases Act 1988. The Ministry also clarified that the RM600 cash assistance for employees compelled to take unpaid leave is inapplicable during the MCO as the minimum period to qualify for the same is 1 month.

Similarly, the Ministry of Human Resources had in the MHR Guideline 07.02.2020 stated that employers should not compel the employees from utilizing their annual leave entitlement or to take unpaid leave during the Quarantine Order or Home Surveillance Order period.

## What Can Employers Do?

Notwithstanding the above, the Ministry of Human Resources had on 16.03.2020 provided a further Guideline on Handling the COVID-19 Outbreak (“MHR Guideline 16.03.2020”) stating that the employers can take reasonable steps to prevent retrenchment of employees, as per the Code of Conduct for Industrial Harmony, that is:-

- (1) Limit the Overtime Hours;
- (2) Reduce working days in a week or to reduce shifts;
- (3) Reduce working hours in a day;
- (4) Implement temporary lay-off in the form of temporary shutdown with payment of reasonable wages and rendering assistance to employees to get temporary employment elsewhere during the layoff period;
- (5) Pay cut in a fair manner across all levels as a last resort after exhausting all other costs saving steps.

Whilst the employers cannot compel its employees to utilize annual leave and/or to take unpaid leave and/or to take a pay-cut, the employer and the employee can mutually agree to the same to avoid retrenchment of the employees.

Hence, the employers who are facing serious economic difficulties are encouraged to renegotiate with the employees to consider salary deduction or to take unpaid leave for a specific period of time in order to ride out the COVID-19 outbreak.

Communication is key and the employers should communicate with their employees to address the predicaments and difficulties faced by the employees. The employers should explain to the employees that implementation of salary deduction, unpaid leave and/or lay off is for mutual benefit of parties in order to avoid drastic measures such as retrenchment of the employees, should the circumstances deteriorate further.

It is important to note that the Guidelines on Retrenchment Management issued by the Department of Human Resources provides that employers should submit a form informing the Ministry of Human Resources of any salary deduction, unpaid leave or layoff at least 30 days before implementing the same.



## **OCCUPATIONAL SAFETY AND HEALTH**

Section 15 of the Occupational Safety and Health Act 1995 (OSHA 1995) provides that it “shall be the duty of every employer and every self-employed person to ensure, so far as is practicable, the safety, health and welfare to work of all his employees”. This could not be more relevant during the COVID-19 outbreak.

It is also the duty of the employer to provide safety and health policy at work for its employees and the organization.

The Department of Human Resources on 07.02.2020 provided the MHR Guideline 07.02.2020 addressing the employers’ queries in relation to Quarantine Orders / Home Surveillance Order or to the employers who instruct their employees not to work after returning from countries such as China, Thailand, Japan, Hong Kong and Singapore. Amongst others, the employers are advised to implement the following:-

- (1) To direct the employees to immediately seek medical examination from a registered medical practitioner at the costs of the employer, as provided under section 60F of the Employment Act 1955;
- (2) to provide paid sick leave or hospitalisation entitlement during the duration of hospitalisation, upon the employee being confirmed with symptom of the coronavirus;
- (3) To pay full wages to the employees during the Quarantine Order or Home Surveillance Order issued by a registered medical practitioner;
- (4) Not to prevent the employees from attending work if they are not under Quarantine Order or Home Surveillance Order issued by registered medical practitioner; and
- (5) Not to compel the employees from utilizing their annual leave entitlement or to take unpaid leave during the Quarantine Order or Home Surveillance Order period.

As for the employees who are required to work as part of the “essential services” provider during the MCO, the Ministry of Human Resources had in the MHR FAQ issued on 19.03.2020 stated that the employers listed in the “essential services” are required to take the following steps:-

- (1) Employer to reduce the number of employees to minimal level or at least 50% from the normal workforce;
- (2) Employer to ensure limited movement of the employees involved;
- (3) Employer to provide thermometer and to take temperature reading of employee every day;
- (4) Employee to ensure compliance with the Prevention of COVID-19 Procedures set by the Ministry of Health from time to time;
- (5) Employer to provide hand sanitizer;
- (6) Employer to carry out disinfection and sanitization process;
- (7) Company to provide guideline on social distancing and ensure compliance to the same.



Whilst the guidelines and FAQ do not carry forces of law per se, parties are encouraged to follow the same as any breaches of these guidelines / FAQ may be taken into consideration when determining whether an employer fulfilled its duties under OSHA 1995 and/or in any claims by an employee.

## **RETRENCHMENT**

Should the economic situation continues to deteriorate and the employers are compelled to take the drastic step of retrenchment, it is imperative to carry out the exercise in a bona fide manner.

Generally, an employer may only retrench its Employees provided that there is redundancy, i.e. excess or surplus of labour. This may occur if the COVID-19 pandemic continues and certain businesses and/or business functions are no longer viable for operation.

Whilst it is the Employer's prerogative to retrench its employees to improve the viability of the business, such retrenchment must be carried out in a manner that is with just cause and excuse under genuine commercial and economic consideration and not for collateral purpose to victimise employee and/or to engage in unfair labour practice.

### **Selection of Employee**

The employer must ensure that the retrenchment exercise subsequent to the redundancy situation done in compliance with the standards of procedure. An employer cannot randomly retrench its employees and must base its selection on identifiable objective criterion.

As a matter of good practice, the Code of Conduct for Industrial Harmony provides criteria for the employer to consider in its selection, inter alia, the following:-

- Ability, experience, skill and occupational qualifications
- Consideration for length of service and status (non-citizens, casual, temporary, permanent)
- Age
- Family situation

Notwithstanding the above, the Employee shall also strictly observe the principle of Last In First Out ("LIFO") in its selection unless there is cogent reason not to do so.

### **Retrenchment Benefits**

Generally, the retrenchment benefits for employee is dependent upon the terms of the Employment Contract.




Where the employee is covered under the Employment Act 1955, i.e. salary less than RM2,000 and/or engaged in manual labour, the retrenchment benefits are as follow:-

<b>Year of Employment</b>	<b>Retrenchment Benefit</b>
< 2 years	10 days wages for every year of employment
2 – 5 years	15 days wages for every year of employment
> 5 years	20 days wages for every year of employment



Where the employment contract is silent on the same, it is accepted good industrial relations practice that an employee is to be paid one (1) month wages for every year of employment.

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